

INTERNSHIP COMPENSATION

OVERVIEW

The Attraction and Retention Council (“Council”) of the Greater Des Moines Partnership is pleased to provide this general legal guide and overview for the purposes of its internship program for members of The Partnership. The purpose of the internship program is to establish a more consistent talent pipeline of students from area educational institutions to The Partnership business community.

The Council believes this initiative helps both members of The Partnership and area education institutions who would like to establish a more consistent pipeline of intern students to the Greater Des Moines business community. This not only increases the quality of student outcomes through expanding industry connections for students and faculty, but also generates better student placement upon graduation.

STRUCTURE

The Council has developed a clearinghouse system to help members define and structure internship opportunities and match those opportunities with the appropriate programs and students at area educational institutions. While particular internships can be defined very narrowly (to take advantage of a particular institution’s or program’s expertise) or broadly (to cast a net for unique individuals), the clearinghouse will help members make the connections necessary to fulfill their needs.

The general structure of the clearinghouse presently recognizes the following five general forms or structures of opportunities:

- a. **Service Learning:** Service learning is typically associated with a class or a learning community. It is designed to provide assistance without compensation for the student. The experience helps to achieve the learning objectives of the class by including community service. The experience concludes with some type of reflection exercise. To be recognized as service learning it must include all three essential elements: community service, a curriculum connection and reflection.
- b. **Field school:** In some disciplines the opportunity for students to practice their profession in the field is provided through specifically designed field school experiences. Three disciplines in the college, Anthropology, Biological Pre-Medical Illustration and Geology / Earth Science, offer such opportunities to undergraduates for a maximum of 6 credits. The summer field school is a graduation requirement for Geology and Earth Science majors.
- c. **Externship:** An externship or job shadowing experience allows a student to spend between a day and several weeks observing a professional on the job.
- d. **Student Employment:** Student employment is any paid opportunity engaged in by a student that does not carry faculty academic supervision or credit.
- e. **Volunteer Experience:** Volunteer experiences are non-employment endeavors undertaken by the student without academic credit or supervision (Note: The issue of pay is dictated by the Fair Labor Standards Act).

LEGAL CONSIDERATIONS

This template is provided courtesy of the Greater Des Moines Partnership.

For additional resources visit DSMpartnership.com/internships101.

Template sources include: Ames Economic Development Corporation’s Employer Intern Guide, Internships.com, Technology Council of Central Pennsylvania and LookSharp.com.



As recent litigation shows, in the current economic recession, many employers have decided to supplement their workforces with unpaid interns. Companies attempting to reduce costs are offering increasingly low paid or voluntary positions that were formerly occupied by “employees” but are now characterized to be “unpaid internships.” Though unpaid interns provide what appears to be a solution for employers struggling with controlling costs in tough economic times, unpaid interns raise unique issues under the Fair Labor Standards Act (FLSA).

The answer to whether interns should be paid, turns on whether the person is covered by the minimum wage and overtime provisions of the FLSA. The FLSA itself is very broad and covers “any individual employed by an employer.” The verb “employ” is defined to mean “to suffer or permit to work.”¹ Though coverage under the FLSA is expansive, the U.S. Supreme Court and the U.S. Department of Labor (DOL) have determined that, in limited circumstances, certain persons may work as “trainees” and not be covered as “employees” under the FLSA.

Owing to the lack of caselaw historically, the regulations set forth by the FLSA have been left open to interpretation by labor attorneys, HR professionals, employers and universities. In 1980, the U.S. Department of Labor published a document to provide clarity to parts of FLSA. A major component of this publication was geared towards defining the employment relationship between a college intern and the host organization.

In *Walling v. Portland Terminal Co.*, the U.S. Supreme Court defined six factors to be considered in determining whether an individual is a “trainee” (not entitled to compensation) as opposed to an “employee” (entitled to minimum wage and overtime pay under the FLSA). The DOL has adopted these factors to be applied to the question of unpaid internships, commonly referred to as the Six Prong Test:

Whether trainees or students are employees of an employer under FLSA will depend upon all of the circumstances surrounding their activities on the premises of the employer. If all of the following criteria apply, the trainees or students are not employees within the mean of the FLSA:

- a. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
- b. The training is for the benefit of the trainees or students;
- c. The trainees or students do not displace regular employees, but work under their close observation;
- d. The employer that provides the training derives no immediate advantage from the activities of the trainees or students, and on occasion his operations may actually be impeded;
- e. The trainees or students are not necessarily entitled to a job at the conclusion of the training period; and
- f. The employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.²

For most employers and universities, four of the six are arguably justified by most internships. However, prongs three and four are the ones that should be examined most closely. Many employers choose to

¹ 29 U.S.C. § 203(e)(1); 29 U.S.C. § 203(g).

² U.S. Department of Labor, *Employment Relations Under the Fair Labor Standards Act*, WH Publication 1297, Reprinted August 1985.

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hire interns to temporarily replace employees who temporarily left the organization, like for FMLA, maternity leave, disability leave.

As recent litigation in 2013 and 2014 shows, it appears that a tough economy has caused some organizations to let full-time employees go in lieu of lower-cost interns. These practices may fault the third prong. The fourth prong is also worth careful thought. The business justification for employers to host interns relies at least in part on the fact that the organization will receive some sort of overt benefit. Turning to the sixth prong, it would appear that nearly all interns are employees of their host organization and, hence, entitled to monetary compensation equal to or greater than the federal minimum wage.

However, in a 2004 Opinion Letter, the U.S. Department of Labor noted that not all interns need to be paid:

“If [the student] obtains college credit for the internship... A faculty coordinator is responsible for advising the student interns and consulting with the company supervisor on a regular basis regarding the student’s performance. The company assumes responsibility for the direct supervision of the student intern. A company supervisor consults with the faculty coordinator about any problems the student encounters and submits an evaluation of the student at the completion of the program.”³

³ U.S. Department of Labor, Opinion letter FLSA2004-5NA, May 17, 2004.

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